

*Preliminary Draft for Discussion Only – not for quotation*

*Some thoughts on Charter Holdings Limited v Commissioner of Inland Revenue*

*[2016] NZCA 499; a glimmer of light in the judicial review tunnel?*

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*Introduction*

In October 2016, the Court of Appeal allowed the taxpayer's appeal against a High Court decision in *Charter Holdings v Commissioner of Inland Revenue* denying judicial review of the Commissioner's decision not to re-consider her decision under section 113 of the Tax Administration Act 1994.<sup>1</sup> Section 113 allows the Commissioner to amend an assessment 'at any time..... in order to ensure its correctness'. The Court of Appeal's order was for the taxpayer's request under section 113 to receive further consideration by a delegate other than the official who made the original decision. This is a classic judicial review outcome. A decision is set aside because of one of the grounds of review is made out and the decision maker is required to make the decision again free of whatever it was that tainted the primary decision.

As is well known, the Courts have shown a reluctance to allow judicial review of the Commissioner's decisions.<sup>2</sup> To over-simplify and generalise, the Courts have been reluctant to allow judicial review when it seems that might be merely a way to avoid invoking the disputes resolution or challenge procedures set out in the Tax

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<sup>1</sup> *Charter Holdings Limited v Commissioner of Inland Revenue* [2016] NZCA 499

<sup>2</sup> *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158; [2012] 2 NZLR 153

Administration Act 1994. They have ascribed paramountcy to those procedures. In that light, the Court of Appeal decision in *Charter Holdings* might perhaps seem a little surprising.

### *Judicial review – generally and tax exceptionalism*

Judicial review is a process by which the court supervises the Executive's actions. In the English revolutionary settlement in 1688, the judges sided with Parliament and conceded any power to control legislation to Parliament. However, they retained their supervisory power over the Executive and this has been described as a 'bulwark against the abuse of power' and an essential protection of 'the citizenry against bureaucratic or executive abuse.'<sup>3</sup> The right to judicial review is one of the rights protected by the New Zealand Bill of Rights Act 1990. It states that 'every person whose rights, obligations or interests ... have been affected by a determination of any tribunal or other public authority .... has the right to apply .... for judicial review of the determination.'<sup>4</sup> The focus in judicial review is on the process of the making of a decision. In that way there is a sharp distinction with an appeal in which the court looks at the merits of the outcome of a decision, rather than the process by which the decision was made. However, while that distinction is easy to state in the abstract, in practice there is less of clear divide between the substance of a decision and the

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<sup>3</sup> Philip Joseph *Constitutional and Administrative Law in New Zealand* (4<sup>th</sup> ed, Thomson Reuters, Wellington, 2014) at 853

<sup>4</sup> New Zealand Bill of Rights Act 1990, s 27(2); judicial review stems from the High Court's inherent jurisdiction and the Judicature Amendment Act 1972

process used in the making of it. This is reflected in the various grounds of review and the characterisation of those grounds.<sup>5</sup>

Parliament has also chosen on occasions to overtly oust the Court's jurisdiction to review the decision-making process in this way in specific ouster or privative clauses. Generally, courts have been uncomfortable with their ousting in this manner and have shown themselves reluctant to relinquish their review function.<sup>6</sup>

However, one area where the New Zealand Courts have become less reluctant to relinquish this role is in taxation administration. Section 109 in the Tax Administration Act 1994 states that 'no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever' other than in objection or challenge procedures in Part 8A and Part 4. Further, section 109 makes it clear that 'every disputable decision and, where relevant, all of its particulars are deemed to be, and are to be taken as being, correct in all respects.' As was said by the Court of Appeal in *Westpac Banking Corp v Commissioner of Inland Revenue* this makes for a 'particularly inauspicious statutory context for judicial review.'<sup>7</sup> In *Westpac Banking*

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<sup>5</sup> Philip Joseph *Constitutional and Administrative Law in New Zealand* (4<sup>th</sup> ed, Thomson Reuters, Wellington, 2014) at 853 – 937; Dean R Knight 'Modulating the Depth of Scrutiny in Judicial Review: Scope, Grounds, Intensity, Context' (2016) 1 NZL Rev 63

<sup>6</sup> The leading case in this regard is *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL)

<sup>7</sup> *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99 at [47]; see further discussion in Shelley Griffiths 'Tax as Public Law' in Andrew Maples and Adrian Sawyer *Taxation Issues Existing and Emerging* (Centre for Commercial and Corporate Law, Christchurch, 2011) 215 at 225 – 232; it is also noteworthy that s 109 is inconsistent on that reading with the right under New Zealand Bill of Rights Act 1990, s 27(2), that would suggest there should have been an inconsistency report by the Attorney General under s 7 of that Act when the Tax Administration Act 1994 was before Parliament. It would appear that that did not happen.

*Corp v Commissioner of Inland Revenue* it was held that it was possible to review decisions of the Commissioner, albeit in very narrow circumstances, confined principally to conscious maladministration.<sup>8</sup> In *Tannadyce v Commissioner of Inland Revenue* the Supreme Court majority decision took a position that is ‘even more restrictive of the availability of judicial review.’<sup>9</sup> In *Tannadyce*, the taxpayer had stated that it could not make its various tax returns because the Commissioner had the possession of the financial records it needed to complete the returns. The majority of the Supreme Court held that ‘disputable decisions’<sup>10</sup> could not be challenged by judicial review unless the taxpayer was practically not able to invoke the statutory challenge procedures. Parliament had clearly intended that disputes and challenges out to be sorted out using the statutory procedures established for that task, not by invoking some other form of resolution. Through the use of the words ‘on any ground whatsoever’ in section 109 Parliament must be taken as meaning that even if a decision or assessment by the Commissioner was one that she could not have made that appropriate avenue for correction was the Part 4A (Disputes) or Part 8A (Challenges) procedures.<sup>11</sup> If there were an error, or illegality or invalidity in a decision or assessment, the Court would be able to correct that following the engagement of the appropriate statutory procedures. The processes of Parts 4A and 8A meant there was no basis for separating ‘matters of correctness from matters of legality’ and this was an ‘efficient and satisfactory process’<sup>12</sup> in tax administration. In effect, the in matters of tax administration, the majority in the Supreme Court saw no

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<sup>8</sup> For an alternative analysis of the basis of determination in *Westpac* see Richard Green ‘Does correctness always trump process?’ *NZLS CLE Tax Conference October 2016* 229 at 240 - 243

<sup>9</sup> *Tannadyce v Commissioner of Inland Revenue* [2011] NZSC 158 at [39] (Elias CJ and McGrath J minority judgment).

<sup>10</sup> Tax Administration Act 1994, s 3(1)

<sup>11</sup> *Tannadyce v Commissioner of Inland Revenue* [2011] NZSC 158 at 54

<sup>12</sup> *Tannadyce v Commissioner of Inland Revenue* [2011] NZSC 158 at [55]

need for the separation of process review from merit determination. There was no need to read section 109 to be subject to the general availability of judicial review, because the challenge procedure gave a 'built in right' to get to the High Court if that were 'necessary or desirable'.<sup>13</sup> The minority agreed that judicial review ought not to be available in the instant case, but Elias CJ and McGrath J had a different perspective on the purpose of judicial review and saw the question of whether judicial review had been ousted by the section 109 as something more fundamental than statutory interpretation. The minority placed emphasis on the constitutional role of judicial review. They wrote:<sup>14</sup>

Statutes limiting recourse to judicial review to challenge statutory decisions accordingly raise issues of constitutional concern. This is reflected in the presumption of the courts when interpreting such legislation, that it was not Parliament's purpose to allow decision-makers power to conclusively determine any question of law. .... The courts are reluctant to read legislation in a manner that impairs their ability to hold public officials to account in this way. These constitutional concerns over access to justice and accountability are also served by the general statutory principle in relation to judicial review that the existence of a right to appeal does not exclude the court's jurisdiction in judicial review proceedings in the same subject matter.

The minority in *Tannadyce* emphasised the constitutional role of the courts in supervision to ensure access to courts and accountability. The majority, focussing on interpreting the statute, saw the statutory challenge procedures as providing sufficient

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<sup>13</sup> *Tannadyce v Commissioner of Inland Revenue* [2011] NZSC 158 at [57]

<sup>14</sup> *Tannadyce v Commissioner of Inland Revenue* [2011] NZSC 158 at [3] – [5]

certainty of access to the courts. The fact of an appeal would ensure the correct answer was found. This raises other concerns. As has been extensively discussed,<sup>15</sup> the disputes resolution process is slow, costly and there is not an automatic right to opt out of it and take the matter to court unless the process has run its full course. The practical reality of access to the courts is, therefore, rather weaker than the theoretical position. However, leaving to one side the issues of actually getting to court because of the expensive and complex nature of the disputes resolution process, that process is not designed to supervise the Commissioner of Inland Revenue's exercise of power. Ensuring accountability for the use of public power and controlling misuse of that power are central to the rule of law.

*Tannadyce* is generally taken as having made the space for judicial review of the Commissioner's decisions very small indeed.<sup>16</sup> A number of cases since then have applied *Tannadyce*. The issue in *Charter Holdings* was the relationship between the privative clause (section 109) and the Commissioner's powers and obligations in section 113 to amend assessments to ensure their correctness. At point was whether her decisions under that provision could be subject to judicial review.

*The Commissioner's standard practice on amendments under section 113*

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<sup>15</sup> Mark Keating *Tax Disputes in New Zealand: A Practical Guide* (CCH New Zealand, Auckland, 2012); William Young 'Tax Disputes in New Zealand' (2009) JATTA 1; Susan Glazebrook 'Tax and the Courts' Address to Chartered Accountants Australia and New Zealand *Tax Conference 2015* and Susan Glazebrook 'Taxation Disputes in New Zealand' Paper presented at the *ATTA Conference* January 2013, both available at [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz)

<sup>16</sup> Andrew Beck 'Privative Clauses' [2012] NZLJ 91; Matthew S R Palmer 'Judicial Review' in Mary-Rose Russell and Matthew Barber (eds) *The Supreme Court of New Zealand 2004 – 2013* (Thomson Reuters, Wellington, 2015) 158 at 163 - 165

It is not surprising that the Commissioner has a standard practice statement on requests to amend assessments. A new standard practice statement was released in February 2016.<sup>17</sup> This is significantly different from the standard practice statement that was in use when the taxpayer in *Charter Holdings* requested an amended assessment. It is to be recalled, however, that the Commissioner is not bound by her standard practice statements.<sup>18</sup> The 2016 Standard Practice Statement is generally considered as taking a broader view of the Commissioner's discretion under section 113. The underlying policy in the old Standard Practice Statement was known as the 'regretted choice' rule.<sup>19</sup> The Commissioner refused to amend assessments if a taxpayer's position arose from a deliberate choice made when filing the original return and that choice later proved unfavourable. In a sense, the Commissioner was in that limiting the exercise of her discretion to correcting mistakes to situations where the taxpayer's original position was less favourable to it than it might have been. In *Westpac Securities*, the High Court stated that the application by the taxpayer in that case raised a 'classic question of judicial review: has the decision maker correctly interpreted the statutory provision providing the power of decision making?'<sup>20</sup> The discretion in section 133 was 'unfettered'<sup>21</sup> by the statute and there was no basis for the Commissioner limiting the exercise of the power to changes that were less favourable to the taxpayer than the original position. The role that section 113 is

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<sup>17</sup> *SPS 16/01 Requests to Amend Assessments* (April 2016)

<sup>18</sup> *Commissioner of Inland Revenue v TiTokai Cabarets (1989) Ltd* (2000) 19 NZTC 15,874 (CA); Shelley Griffiths 'Tax as Public Law' in Andrew Maples and Adrian Sawyer *Taxation Issues Existing and Emerging* (Centre for Commercial and Corporate Law, Christchurch, 2011) 215 at 230 - 232

<sup>19</sup> *SPS 07/03 Requests to Amend Assessment*, see especially at [40] amendments could not be made if 'the Commissioner is not satisfied that genuine errors were made'

<sup>20</sup> *Westpac Securities NZ Limited v Commissioner of Inland Revenue* [2014] NZHC 2041 at [31]

<sup>21</sup> *Westpac Securities NZ Limited v Commissioner of Inland Revenue* [2014] NZHC 2041 at [59]

‘required to play in the Tax Administration Act necessitates that it not be unduly constrained’.<sup>22</sup>

The new Standard Practice Statement recognises the breadth of the discretion and the balancing with the Commissioner’s ‘care and management’ obligations and the protection of the integrity of the tax system<sup>23</sup> that needs to be made in exercise of the s 113 discretion. The discretion is no longer stated to be constrained to the correction of ‘genuine errors’. Apart from anything else, the result in *Westpac Securities* demonstrates just how important the role of the courts is in the supervision of executive decision making.

*Charter Holdings Limited v Commissioner of Inland Revenue*

(i) The Facts

In both 2000 and 2001 the company suffered losses. In the 2001 tax return the director left blank the answer to the question ‘can the company claim net losses brought forward.’ In 2003, the company went into receivership, and when the company was released from receivership in 2005 there were no assets available to pay the unsecured creditors. The company continued to operate as a management consultancy business and the tax returns for 2002 and 2003 were not filed until 2006. In both years there were losses of over \$400,000 and in both tax returns the director again failed to answer the loss carried forward question. The returns for the following years were not filed and in 2012 and the Commissioner sent the taxpayer a final notice

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<sup>22</sup> *Westpac Securities NZ Limited v Commissioner of Inland Revenue* [2014] NZHC 2041 at [68]

<sup>23</sup> Tax Administration Act 1994, ss 6 and 6A



stating that the returns for 2005 – 2012 were outstanding. Legal action was threatened. These returns were filed a few months later. The 2005 return disclosed a net loss of \$400,000. However, in the subsequent years the company earned profits. Each of the tax returns again failed to correctly apply losses brought forward. In the High Court, the judge found that the director who had filed all the tax returns was of the mistaken belief that the Commissioner maintained a record of losses for past years. Subsequent notices confirmed the 2005 loss and assessed tax for the 2006 – 2012 years, applying interest and penalties. The company wrote to the Commissioner noting that losses had not been applied to subsequent profits and asked ‘please apply and correct the Statement of Account.’ The letter was received on 15 April 2013 and by 19 July it finally made its way to the Whangarei office where Ms Hay reviewed the file. She noted that the April letter did not meet the requirements of the standard practice statement on requests to amend assessments.<sup>24</sup> She telephoned the company’s director and told him the 2004 return needed to be filed first and he had to make a ‘proper request’ for amendment. The director had until this point assumed that the receiver had filed the 2004 return. That return was filed in early 2014, it too showed a loss and again he did not answer the loss carried forward question. The file was now being handled by Ms Kaur. She informed him that financial statements for the company for 2000 – 2005 were required and that his request for reassessment had been declined because there was no ‘information to substantiate’ the claim. The director replied that the financial statements had been supplied when

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<sup>24</sup> Inland Revenue Department *Standard Practice Statement: Requests to Amend Assessments* (SPS 07/03) (subsequently withdrawn in 2016)

the returns were originally filed, but he obtained further copies, sent them and again asked to have the tax losses for the period 2000 – 2005 applied to the subsequent profits. Ms Kaur then completed an internal checklist designed for referral of a file to the Legal Technical Services ('LTS') division for a decision under section 113. She recorded on the checklist that a 'genuine error' had been made in not answering the questions in the relevant tax returns, that all financial statements to substantiate the claim had been received and she recommended the application be accepted.<sup>25</sup>

The section 113 decision was made by Ms Stowers in LTS. She did not agree that the financial statements provided the necessary information to substantiate the claim for losses and raised a number of questions, including the fact that when filing his personal returns, the director had correctly answered the loss carried forward question. She also expressed some conclusions on factual errors she thought were in the tax returns as filed.<sup>26</sup> She concluded that the returns as filed were not correct. The taxpayer was informed of that decision on 19 June 2014. The last date it could have initiated the statutory dispute procedures was 17 June 2014.<sup>27</sup>

The taxpayer commenced judicial review procedures on the basis the decision was based on material errors of fact. Those errors were Ms Stowers' reliance on the director's apparent knowledge of procedures

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<sup>25</sup> *Charter Holdings Limited v Commissioner of Inland Revenue* [2016] NZCA 499 at [24]

<sup>26</sup> *Charter Holdings Limited v Commissioner of Inland Revenue* [2016] NZCA 499 at [26] – her points (1) – (9)

<sup>27</sup> *Charter Holdings Limited v Commissioner of Inland Revenue* [2016] NZCA 499 at [29] – [30]

shown in his personal tax return leading her to conclude that he had not made a genuine error in the company's returns.<sup>28</sup> She had also concluded that the sale of operations of the company was not a genuine sale and the taxpayer's response to that was there was no factual foundation to that conclusion.<sup>29</sup> She had also concluded the company must have had sales income in 2005, but again there was no factual basis for this conclusion.<sup>30</sup> What the taxpayer sought was a fresh consideration of the decision under section 113 and one free from the errors it alleged had been the basis of Ms Stowers' decision.

(ii) *The High Court rejection of judicial review*

In the High Court, Moore J dismissed the application for review on the basis that the taxpayer had been able to invoke the challenge or disputes resolution processes and had failed to do so. The effect of *Tannadyce* was that judicial review of the Commissioner's decision under s 113 was impossible. What the taxpayer was trying to do was to 'use the judicial review avenue to dispute the quantification of its tax liability.' All the issues the taxpayer raised were ones that were addressable by the

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<sup>28</sup> *Charter Holdings Limited v Commissioner of Inland Revenue* [2016] NZCA 499 at [67]

<sup>29</sup> *Charter Holdings Limited v Commissioner of Inland Revenue* [2016] NZCA 499 at [70]

<sup>30</sup> *Charter Holdings Limited v Commissioner of Inland Revenue* [2016] NZCA 499 at [74]

challenge and disputes procedures. Section 109 prevented the taxpayer from raising the issues in the way it had.<sup>31</sup>

(iii) *The Court of Appeal*

The Court's analysis started with the wording of section 113. It is worth reproducing the exact section. It reads:<sup>32</sup>

**Commissioner may at any time amend assessments**

(1) Subject to sections 89N and 113D, the Commissioner may from time to time, and at any time, amend an assessment as the Commissioner thinks necessary in order to ensure its correctness, notwithstanding that tax already assessed may have been paid.

(2) If any such amendment has the effect of imposing any fresh liability or increasing any existing liability, notice of it shall be given by the Commissioner to the taxpayer affected.

The Court concluded that this was a 'straightforward conferral of power on the Commissioner without any reference to restrictions derived from other statutory processes.' Additionally, section 138E(1)(e)(iv) takes section 113 out of the definition of 'disputable decision'. It will be remembered that section 109 specifically refers to 'disputable decisions.' The analysis is then quite straightforward. A decision whether to amend or not under section 113 is not a 'disputable decision' and cannot therefore be subject to the statutory disputes and challenges procedure. An amendment made under section 113 is subject to the disputes and challenges procedures. In a sense this fits in with our simplified concept of judicial review described above. A decision is reviewable to ensure the

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<sup>31</sup> *Charter Holdings Ltd v Commissioner of Inland Revenue* [2015] NZHC 2041 at [82] – [85]

<sup>32</sup> Tax Administration Act 1994, s 113; section 89N concerns the finalization of the assessment at the disputes resolution process and s 113D is a technical provision regarding research and development credits.

fairness and so on of the process. The outcome of a decision is subject to an appeal.

The taxpayers complaint here was that the decision making was flawed because it was based on mistakes of fact. It wanted the decision made again free of those flaws.

The power given the Commissioner is a remedial one so that assessments can be amended to ensure 'correctness'. In the Court of Appeal's opinion that is directly related to the Commissioner's over-arching obligations to protect the integrity of the tax base.<sup>33</sup> It was 'not persuaded that s 109 should impact on the interpretation of s 113.'<sup>34</sup> The Court then considered the basis for judicial review, a right it will be recalled that is protected in the New Zealand Bill of Rights Act 1990.<sup>35</sup> It saw the majority and minority in *Tannadyce* essentially agreeing about the fundamental importance of judicial review. Where they differed was in respect of the effect of section 109. The majority considered that 'any concerns that otherwise might have existed about the breadth of s 109 were assuaged' by the statutory disputes and challenge procedures.<sup>36</sup> The Court of Appeal therefore did not see *Tannadyce* as standing for a 'restriction on the

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<sup>33</sup> Tax Administration Act 1994, s 6(1)

<sup>34</sup> *Charter Holdings Limited v Commissioner of Inland Revenue* [2016] NZCA 499 at [53]

<sup>35</sup> Bill of Rights Act 1990, s 27(2)

<sup>36</sup> *Charter Holdings Limited v Commissioner of Inland Revenue* [2016] NZCA 499 at 57, quoting *Tannadyce v Commissioner of Inland Revenue* [2011] NZSC 158 at [57]

general right to apply for judicial review of the exercise of the Commissioner's powers under s 113.<sup>37</sup>

A taxpayer's decision not to invoke the challenge or dispute resolution procedures might be a relevant matter for a decision-maker to take in to account, as it was in *Arai Korp* and *Westpac Securities*.<sup>38</sup> But the fact that the taxpayer had not made that choice was not fatal to the possibility of review.

The Court of Appeal then had to determine the merits of the application. It concluded that the Commissioner had made several errors of fact<sup>39</sup> in the decision making process. An order that the decision be referred back to the Commissioner was made accordingly.

#### *The significance of the decision*

Although it is generally considered that post-*Tannadyce* judicial review is severely curtailed in tax administration, this case shows that that is not inevitably the case. It depends on the nature of the decision being made by the Commissioner. I have argued elsewhere that the Commissioner's decisions on whether to allow opt out of

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<sup>37</sup> *Charter Holdings Limited v Commissioner of Inland Revenue* [2016] NZCA 499 at [57]

<sup>38</sup> *Arai Korp Ltd v Commissioner of Inland Revenue* [2013] NZHC 958, (2013) NZTC 21-104 at [69]; *Westpac Securities Limited v Commissioner of Inland Revenue* [2014] NZHC 3377, (2014) NZTC 21-118 at 67]

<sup>39</sup> An error of fact now being a legitimate ground for review, *Taylor v Chief Executive of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at 94

the disputes procedure and referring the matter to the Court for determination,<sup>40</sup> ought to be reviewable.<sup>41</sup> There will be others. There must remain a role for judicial review. *Westpac Securities* and this case illustrate why. The decision made by the Commissioner's delegate in *Charter Holdings* was flawed. The Court of Appeal has made it clear that the effect of the Supreme Court's decision in *Tannadyce* is not to 'compel' the use of the challenge and disputes resolution processes to the point of emasculating section 113. Secondly, it also makes it clear that the effect of section 109 is not a total bar to judicial review of every decision the Commissioner makes. *Wespac Securities* made it clear that the Commissioner's interpretation of s 113 was wrong and led to the incorrect fettering of the discretion that Parliament had given.

Judicial review acts an important buttress to the rule of law to ensure that administrative decision making is appropriately bounded. To put it in tax administration language, it is there to ensure that 'those administering the law do so fairly, impartially and according to law.'<sup>42</sup>

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<sup>40</sup> Tax Administration Act 1994, s 89N(1)(c)(viii) taxpayer's having no unilateral right of opt out of the disputes resolution procedure to opt in to substantive determination in the Court.

<sup>41</sup> Shelley Griffiths *Resolving New Zealand tax disputes: finding the balance between judicial determination and administrative process* paper presented at the ATTA conference, Sydney, 17 January 2012

<sup>42</sup> Tax Administration Act 1994, s 6(2)(f)